



**Pasha v Wang’ombe & 2 others (Environment & Land Case 135 of 2017)
[2024] KEELC 6292 (KLR) (26 September 2024) (Judgment)**

Neutral citation: [2024] KEELC 6292 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 135 OF 2017
LC KOMINGOI, J
SEPTEMBER 26, 2024**

BETWEEN

AGNES NAISIANO RIANO PASHA PLAINTIFF

AND

STEPHEN K WANG’OMBE 1ST DEFENDANT

COUNTY COUNCIL OF OLKEJUADO 2ND DEFENDANT

COMMISSIONER OF LANDS 3RD DEFENDANT

JUDGMENT

1. By the Complaint dated 18th May 2011 and Amended on 19th July 2011 initially filed at the High Court at Machakos and later transferred to this court, the Plaintiff claims that: She is the owner of property known as Plot No.1/Business Ongata Rongai Trading Centre having acquired it on 16th February 2005 from the late Simon S. Riano Pasha through High Court Succession Cause No. 252 of 2003. She was in quiet and peaceful possession of the same including paying rates until sometime in August 2010 when the 1st Defendant entered the property and started excavating it with the intention of putting up permanent structures thereon. He was asked to stop the excavation but he defied. She stated that there was previously a suit being SRMCC No. 291 of 2010 which was withdrawn. She thus seeks:
 - a. A declaration that she is the rightful and lawful owner of land parcel known as plot No.1/Business Ongata Rongai Trading Centre.
 - b. A permanent injunction to be issued against the Defendants either by themselves, agents and/or servants from evicting the Plaintiff from land parcel known as plot No.1/Business Ongata Rongai Trading Centre and also restraining the Defendants from selling, charging, disposing, dealing or interfering in any way with the Plaintiff’s proprietary rights over land parcel known as plot No.1/Business Ongata Rongai Trading Centre.



- c. A declaration that any interest and / or titles issued to the 1st Defendant by the 2nd Defendant over land parcel known as plot No.1/Business Ongata Rongai Trading Centre are hereby cancelled and nullified in favour of the Plaintiff's proprietary interest in land parcel known as plot No.1/Business Ongata Rongai Trading Centre.
 - d. Costs of the suit.
 - e. Any other relief that this Hon. Court seems fit to grant.
2. The 1st Defendant in his statement of Defence and Counterclaim denied the Plaintiff's allegations stating that he was the registered owner of property LR No. 13796 having been registered as such on 27th July 2007 after purchasing it from Simon Mbocha Kamuyu and Esther Wanjiru Kamuyu, (hereinafter referred to as the Kamuyus). He was therefore the lawful registered owner. He was neither aware of any earlier dispute nor the said Plot No. 1 Business Ongata Rongai Trading Centre. It is his case that the Plaintiff had trespassed on his property and seeks:
- a. An order for eviction of the Plaintiff from the suit land therein;
 - b. Permanent injunction to issue restraining the Plaintiff trespassing onto, constructing, occupying and or in any manner whatsoever interfering with the 1st Defendant's title LR No. 13796;
 - c. Costs of this suit.
3. The 2nd Defendant in the statement of defence indicated that the property in dispute was Plot No. 40 Noonkoporir as per the plan and belonged to the Plaintiff.
4. The 3rd Defendant neither entered appearance nor filed its defence.

Evidence of the Plaintiff

5. PW1, Agnes Naisiano Riano Pasha adopted her witness statement as part of her evidence in chief and produced her bundle of documents herein marked as P. Exhibit 1-18. She stated that the late Simon S. Pasha was her husband. He passed away in 2002 and she was granted letters of administration. She stated that prior to his demise, he had a dispute with Simon Kamuyu who was asked to return his title to the County Council as per the letter dated 25th February 1993 but he declined. He later sold it to Stephen Wang'ombe the 1st Defendant herein. She therefore contested the counterclaim indicating that the said Kamuyus had no land to sell.
6. On cross examination she stated that the suit property belonged to her husband's parents from 1986 as shown in the allotment letter. She stated that her husband had put up structures on the property and there were tenants thereon. In 2005 the plot was transferred to her and was issued with another letter of allotment on 20th May 2007. She confirmed that the 1st Defendant then entered and started constructing on the suit property despite her protests. On re-examination she maintained that the plot belongs to her and had documents to confirm the same.

Evidence of the Defendants

7. DW1 Stephen Wang'ombe adopted his witness statement as part of his evidence in chief and produced his bundle of documents which was marked as D. Exhibit 1-4. He stated that he purchased his property from the Kamuyus having undertaken due diligence and confirmed that it was registered in their names. The same was vacant. He was not aware of a dispute regarding the property and there was no encumbrance registered against it. The property was then transferred and registered in his name



as shown in the Certificate of Title. He confirmed that he received a letter from the County Council of Kajiado in 2010 indicating that he had encroached the suit property to which he responded. The County Government then sent a surveyor to establish beacons between the Plaintiff's plot and his plot, but the beacons were removed. He also stated that he applied for building approvals and the same were approved that is why he proceeded to undertake construction.

8. On cross examination he confirmed that he did not have evidence to confirm payment of the purchase price or the sale agreement. He stated that he did not have evidence to show that the surveyor had confirmed the plots boundaries, he did not have evidence of stamp duty paid for the purchase or that his property was Plot No. 2 not Plot No. 1. He also stated that he was not aware the previous owners had been asked to surrender their title.
9. On re-examination he stated that the previous owners transferred the property to him in 2007 and he did not have a claim against them because they had a certificate of title.
10. DW2 Jonathan Oseur, the County Land Registrar Kajiado produced as evidence the letter dated 24th March 2021 which confirmed ownership of the property. On cross examination he confirmed that the property was transferred to Agnes Pasha in 2005 and their records showed that Agnes was the registered owner of Plot No. 1 Business Ongata Rongata and not Stephen Wang'ombe. On being shown the parties documents, he confirmed that Plot No. 1 Business Ongata Rongai was not the same as LR No. 13796. While indicating that leases were issued by the Ministry of Lands, he confirmed that Agnes had not been issued with title to the plot and he equally could not confirm the 1st Defendant's plot because they were not in the records of the 2nd Defendant.
11. On re-examination he confirmed that he had produced documents in his custody and he had not received an application to process a lease.
12. At the close of the oral testimonies parties tendered final written submissions.

The Plaintiff's Submissions

13. On whether plot No.1/Business Ongata Rongai Trading Centre was the same as LR No. 13796, counsel submitted that there was a letter from the Ministry of Lands dated 30th December 1988 that categorically indicated that Mr. Pasha's plot No. 1 was different from plot No. 2 and that the two plots were adjacent to each other. Similarly, on 12th November 1992 the Commissioner of Lands indicated that he could not process allocation documents to the rightful owner of unsurveyed Plot no.1 (LR 13796) because of the existing title. The Commissioner would then write to the Kamuyus on 25th February 1993 asking them to surrender title over LR No. 13796 for it to be cancelled but this was never done. Instead they proceeded to transfer it to the 1st Defendant, a transfer that was null and void. Therefore, the Plaintiff was the lawful owner of Plot No.1 having followed due process to get it registered in her name by complying with all the requirements of the allotment letter. That the said Letter of Allotment had never been cancelled and could therefore not be allotted to someone else. Reference was made to the cases of *Kaseve Welfare Society v Harp Housing Ltd* [2020] eKLR, *Mbau Saw Mills Ltd vs Attorney General (for and on behalf of the Commissioner of Lands) & 2 others* [2014] eKLR, *Ali Gadaffi & another vs Francis Muhia Mutungu & 2 others* [2017] eKLR and *Wreck Motors Enterprises vs Commissioner of Lands & 3 others* [1997] eKLR.
14. On whether the 1st Defendant regularly acquired the suit property, counsel submitted that the 1st Defendant did not adduce evidence to show how he acquired the suit property and the only thing that was produced was a certificate of title which was not enough proof of procedural acquisition as espoused under Section 26(1) of the [Land Registration Act](#). Counsel added that the Commissioner



of Lands in the letter dated 30th December 1988 had questioned the previous owners on how they acquired the property, yet the County Council or Commissioner of Lands had not participated in allocating them the land. Therefore, at no point was the ownership by the 1st Defendant or the previous owners. He put forward the case of Daudi Kiptugen vs Commissioner of Land & 4 others (2015) eKLR, Hubert L. Martin & 2 others vs Margaret J. Kamar & 5 others [2016] eKLR and Munyu Maina vs Hiram Gathiha Maina.

15. On whether a cancelled title can pass good title, counsel submitted that on 25th February 1993, the Kamuyus were asked to surrender their title for cancellation, but instead transferred it to someone else. Since it ought to have been cancelled, then the court should issue a cancellation order as provided under Section 80 of the *Land Registration Act* and dismiss the 1st Defendant's counterclaim with costs to the Plaintiff.

The 1st Defendants' submissions

16. On whether the 1st Defendant had trespassed on the Plaintiff's property, counsel submitted that the Plaintiff's alleged Letter of Allotment was issued after the Grant of Letters of Administration in 2015 which was after the 1st Defendant had already acquired the property in 2007. He was thus protected by Section 24 and 26 of the *Land Registration Act*. Counsel acknowledged that while he received communication vide letter dated 24th August 2010 from the 2nd Defendant about the trespass allegation, his construction plans were approved and NEMA also granted him an Environmental Impact Assessment License and has continued to make payment for his property LR No. 13796. Therefore, his property is different from that of the Plaintiff's.
17. On whether the 1st Defendant holds a valid title, counsel submitted that his sanctity of title was protected because it was not acquired fraudulently as he was an innocent purchaser for value without notice of any dispute regarding the property. Adding that the letter of allotment claimed by the Plaintiff did not confer to her any legal interest in the land and by the time it was alleged allotted to her it was no longer in existence having been allotted to the Kamuyus and there was no basis for cancellation of the Defendant's title. Reference was made to Shiva Mombasa Ltd vs Kenya Revenue Authority [2005] eKLR, Caneland Ltd vs Commissioner of Lands, Benja Properties Ltd vs Syedna Mohammed Burhannudin Sahed & 4 others [2015] eKLR and Lilian Waithera Gachuhi vs David Shikuku Mzee[2005] eKLR.
18. As such, the Plaintiff's suit should be dismissed and the 1st Defendant's counterclaim allowed with costs.

Analysis and Determination

19. I have considered the pleadings, the evidence on record, the written submissions, and the authorities cited. I find that the issues for determination are:
 - i. Whether Plot No. 1/Business Ongata Rongai Trading Centre and LR No. 13796 are one and the same plot;
 - ii. Who is the lawful owner of the said plot?
 - iii. Whether the Plaintiff is entitled to the prayers sought;
 - iv. Whether the Defendant is entitled to the prayers sought in the counterclaim;
 - v. Who should bear costs of the suit?



20. The Plaintiff claims that the suit property known as Plot No. 1/Business Ongata Rongai Trading Centre belonged to her late husband's parents from the year 1986, then to her husband Simon S. Riano Pasha until his demise in 2002. She was then granted Letters of Administration in 2003 and the property was transferred and registered in her name in the year 2005 and an allotment letter issued to her in 2007.
21. In response to these claims, the 1st Defendant contests the Plaintiff's ownership, asserting that he lawfully purchased the property designated as LR No. 13796 in 2007 from the Kamuyus. The 1st Defendant maintains that he conducted thorough due diligence prior to the purchase, during which he confirmed that the property was registered in the names of the Kamuyus, thereby reinforcing his belief that the transaction was valid and binding.
22. The Plaintiff vehemently disputes the validity of the title claimed by the Defendant, arguing that the Kamuyus were not in a position to convey a valid title for the disputed property to the Defendant. The Plaintiff asserts that as far back as the 1990s, the Kamuyus were fully aware of the ongoing dispute concerning the ownership of the suit property. She further claims that the Commissioner of Lands had explicitly requested the Kamuyus to surrender the title to the suit property due to the existing dispute; however, they willfully refused to comply with this directive. As a result of their refusal, the Plaintiff contends that any purported transfer of title to the 1st Defendant is fundamentally flawed, null and void. Consequently, she argues that the actions by the Kamuyus, were in defiance of the Commissioner of Lands' directive, rendered them incapable of passing a legitimate and good title to the 1st Defendant, thereby invalidating his claim to the property.
23. The Plaintiff produced a letter dated 12th November 1992 from the Commissioner of Lands addressed to the Kamuyus and copied to Simon Pasha among others. The letter referring to LR No. 13796 Ongata Rongai Township reads:
- “Reference is made to the above piece of land which you are registered owners (as tenants in common in equal shares.) It has been brought to my notice that the parcel of land to which you are registered is actually developed by somebody else. In the actual sense, your plot should be unsurveyed plot No. 2 as shown on the attached sketch plan.
- In this regard, I am unable to process any allocation documents to the rightful owner of unsurveyed plot No. 1 (currently LR No. 13796) because of the existing title in respect of the letter.
- I am therefore requesting you to surrender to this office the title in respect of the above parcel of land so as to give documentation of the right piece of land to you and to the person who has developed the above property. I would be glad if this is complied with within a period of two months from the date of this letter...”
24. From this letter, it is clear that plot No. 1 Business Ongata Rongai (currently LR No. 13796) belonged to someone else and not the Kamuyus and they ought to have surrendered the title. However, it seems like the said title was never surrendered because the letter dated 25th February 1993 whose heading is Surrender of LR 13796 Ongata Rongai Township, from the Commissioner of Lands to the Kamuyus reads:
- “... wish to inform you that unless the title deed in reference is not surrendered within two weeks from the date of this letter, I will have no option but to use the available machinery to have the title cancelled and or to surrender to government...”



25. This Court is guided by the fundamental legal principle that the burden of proof lies with the party who asserts the existence of certain facts upon which a legal right or liability is contingent. This principle is enshrined in Section 107(1) of the *Evidence Act*, which unequivocally stipulates that “Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.” In accordance with this statutory provision, it is incumbent upon the Plaintiff to demonstrate, to the requisite standard of proof, the veracity of the claims upon which she seeks judicial relief.
26. After a thorough analysis of the evidence presented before this Court, I find that the Plaintiff has discharged her burden of proof. The Plaintiff has established, on a balance of probabilities, that the property referred to as Plot No. 1 Business Ongata Rongai and LR No. 13796 Ongata Rongai are, one and the same. The Court finds that the Plaintiff has provided sufficient evidence to substantiate this assertion, thereby satisfying the legal requirement to prove the existence of the factual basis upon which her claim is predicated.
27. From the foregoing it is not in dispute that Plot No. 1 Business Ongata Rongai and LR. No.13796 are one the same plot.
28. Whereas Section 26 of the *Land Registration Act* stipulates that a certificate of title should be held as conclusive evidence of proprietorship, it is also settled that the process of its acquisition must be as good as the title. The Court of Appeal in *Munyu Maina v Hiram Gathiha Maina* [2013] eKLR held: “...We state that when a registered proprietor’s root of title is under challenge, it is not sufficient to dangle the instrument of title as proof of ownership. It is this instrument of title that is in challenge and the registered proprietor must go beyond the instrument and prove the legality of how he acquired the title and show that the acquisition was legal, formal and free from any encumbrances including any and all interests which need not be noted on the register...”
29. The Plaintiff asserts that the suit property, Plot No. 1 Business Ongata Rongai Trading Centre, has been under her family’s ownership since 1986. According to the Plaintiff, the property originally belonged to her late husband, Simon S. Riano Pasha, who acquired it on 24th January 1986. The Plaintiff has produced several exhibits to substantiate her claim. Among the documents presented is the original transfer document of Plot No. 1 Business Ongata Rongai Trading Centre, dated 24th January 1986, which clearly shows the transfer of the property to her late husband, Simon S. Riano Pasha.
30. Further bolstering her claim, the Plaintiff submitted a letter dated 16th December 1988, from the OlKejuado County Council addressed to the Managing Director of Kenya Posts and Telecommunications. This letter reveals that Mr. Simon S. R. Pasha had formally lodged a complaint about telephone wires obstructing the development of his plot, further corroborating his ownership of the property during that period. Additionally, the Plaintiff produced a Certificate of Confirmation of Grant dated 7th July 2004, which explicitly lists Plot No. 1 Business Ongata Rongai as part of the estate devolving to her following the death of her husband. This was followed by the transfer of the plot to her on 16th February 2005.
31. Although the allotment letter for the property was not among the documents presented in court, the Plaintiff’s claim was further supported by the testimony of DW2 the County Land Registrar Kajiado. The Land Registrar confirmed that, according to their official records, Agnes Naisanoi R. Pasha, the Plaintiff, was indeed the registered owner of Plot No. 1 Business Ongata Rongai Trading Centre.
32. The Defendant, on the other hand, contends that he acquired the suit property from the Kamuyus. However, this claim is unsupported by documentary evidence. The Defendant has failed to produce a sale agreement, any proof of payment, executed transfer documents, or any other form of evidence



that would corroborate his assertion of having purchased the property from the Kamuyus. Instead, he produced a certificate of provisional title. However, there is no explanation as to why a provisional certificate of title was issued or the specific process by which it was obtained, raising significant questions about its legitimacy.

33. Moreover, while the 1st Defendant testified that he conducted due diligence and confirmed that the property was registered in the names of the Kamuyus prior to the purchase, he has not produced any evidence to substantiate this claim. The 1st Defendant also failed to take legal action against the purported sellers, which further casts doubt on the authenticity of his claim.
34. It is a well-established legal principle that the legitimacy of an outcome is intrinsically linked to the integrity of the process by which it was achieved. If the process is flawed or tainted by irregularities, the resulting outcome is inherently defective. In this case, the 1st Defendant's acquisition of the title to the suit property is riddled with a lot of inconsistencies. Beyond his mere assertion of being a bona fide purchaser and the indefeasible owner of the property, the Defendant has failed to demonstrate any legitimate basis for his claim to the title. The evidence before the court strongly suggests that the manner in which the Kamuyus acquired and transferred the title was irregular. In a jurisdiction where land transactions are sometimes plagued by irregularities, the manner in which the 1st Defendant handled this transaction was reckless, if not outright fraudulent. These sentiments were echoed by the Court of Appeal in *Arthi Highway Developers Limited v West End Butchery Limited & 6 others* [2015] eKLR:

“... It was common knowledge, and well documented at the time, that the land market in Kenya was a minefield and only a foolhardy investor would purchase land with the alacrity of a potato dealer in Wakulima market...”

35. Though the 1st defendant feigns ignorance, there is compelling evidence in the form of letters dated 1992 and 1993, indicating that the Commissioner of Lands had formally requested the Kamuyus to surrender the title to LR No. 13796. The reason for this request was that the property had been erroneously registered in their names. This evidence unequivocally demonstrates that the Kamuyus were not the rightful owners of LR No. 13796 and, therefore, had no legal authority to dispose of it. The legal maxim -*nemo dat quod non habet*-one cannot give what one does not have applied in this case. As a result, the 1st Defendant cannot claim to be a bona fide purchaser for value without notice, the Kamuyus were not the lawful owners in the first place. This is supported by the Supreme Court's decision in *Dina Management Limited v County Government of Mombasa & 5 others* [2023] KESC 30 (KLR) where it held:

“94. To establish whether the appellant is a bona fide purchaser for value therefore, we must first go to the root of the title, right from the first allotment...”

111. Having found that the 1st registered owner did not acquire title regularly, the ownership of the suit property by the appellant thereafter cannot therefore be protected under article 40 of *the Constitution*. The root of the title having been challenged, as we already noted above the appellant could not benefit from the doctrine of bona fide purchaser.”

36. Consequently, the 1st Defendant's claim to be the lawful registered owner of property LR No. 13796 is without merit. Given the irregularities and the lack of legitimacy in the acquisition of the title, this Court finds that any title held by the 1st Defendant should be cancelled in accordance with Section 80



of the [Land Registration Act](#), which provides for the rectification of the register in instances where a title has been obtained, made, or omitted by fraud or mistake.

37. The transfer of the Plot to the 1st Defendant was in the year 2006, which is ten years after the Kamuyu's were asked to surrender the title. The same can be impeached as there was no way the title could be issued when the Commissioner of Lands had asked for the surrender of title. This could only mean the 1st Defendant and the Kamuyu's must have colluded with officials in the office of the Commissioner of Lands to ignore the previous letters. This means the title to the 1st Defendant was transferred through fraud and or misrepresentation and he was aware of it. His counter – claim is found to be without merit and the same is dismissed.
38. In light of the foregoing, this Court is satisfied that the Plaintiff has proved her case in a balance of probabilities. The evidence presented has established that Plot No. 1 Business Ongata Rongai Trading Centre was indeed transferred to the late Simon R.S.Pasha in 1986 and subsequently transferred to the Plaintiff in 2005.
39. In conclusion, I find that the Plaintiff has proved her case as against the Defendants on a balance of probabilities.
40. Accordingly Judgement is entered for the Plaintiff as against the Defendants as follows:
 - a. That a declaration is hereby issued that the Plaintiff Agnes Naisiano Riyo Pasha is the rightful owner of Plot No.1 Business Ongata Rongai Trading Centre.
 - b. That a permanent injunction is hereby issued against the Defendants either by themselves, agents and/or servants from evicting the Plaintiff from land parcel known as plot No.1/ Business Ongata Rongai Trading Centre and also restraining the Defendants from selling, charging, disposing, dealing or interfering in any way with the Plaintiff's proprietary rights over land parcel known as plot No.1/Business Ongata Rongai Trading Centre.
 - c. That a declaration is hereby issued that any interest and or titles issued to the 1st Defendant by the 2nd Defendant over land parcel known as Plot No.1/Business Ongata Rongai Trading Centre are hereby cancelled and nullified in favour of the plaintiff's proprietary interest in land parcel known as Plot No. 1/Business Ongata Rongai Trading Centre.
 - d. The Land Registrar is directed to effect (c) above within sixty (60) days from the date of this Judgement.
 - e. That the Plaintiff shall have costs of the suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 26TH DAY OF SEPTEMBER 2024.

L. KOMINGOI

JUDGE.

In the presence of:

Ms. Wambua for Mr. Opiyo for the plaintiff.

Ms. Maundu for Mr. Dondo for the 1st Defendant.

N/A for the 2nd, 3rd Defendants.

Court Assistant – Mutisya.

